

Remarks

Upon entry of the amendments, claims 1, 3-5, 8-11, 15-25, 27, 28 and 38 are pending. Applicant notes with appreciation that claims 3 and 4 are allowed. Claims 1, 8-10, 15 and 24 stand rejected. Claims 9, 10, 20, 23, 27, 28 and 37-40 are objected to. Applicant further notes with appreciation that objected to claims 37-40 would be allowable if rewritten in independent form.

Amendments To The Claims

Claims 1 and 38 have been amended. Claims 37, 39 and 40 have been canceled.

Claim 1 has been amended to incorporate the elements of claim 37. Claim 37 supports this amendment.

Claim 38 has been amended to switch its dependency from now canceled claim 37 to claim 1 which was amended to include the recitations of claim 37.

Applicant respectfully requests entry of the amendments after final rejection. The amendments place the claims in condition of allowance, i.e., they obviate the rejections of record. The amendments are formal in nature and therefore introduce no new matter. The amendments raise no new issues requiring further consideration or search. Furthermore, the amendments add no new claims. Applicant makes these amendments without prejudice. The amendments are not to be construed as abandonment of the previously claimed subject matter.

Election/ Restrictions

Applicant notes with appreciation that the restriction requirement mailed on December 7, 2007 is withdrawn and that the Group I and II claims are examined together.

Applicant submits that the final Office Action incorrectly summarizes the claims encompassed by Applicant's election to the Restriction Requirement. The final Office Action states that Applicant elected Group I, claims 1, 3, 4, 8-10, 15, 18-21, 23-25, 27, 28 and 37-40 for prosecution. However, both the Restriction Requirement mailed December 7, 2007 and Applicant's response to the Restriction Requirement filed March 7, 2008, included claims 1, 3, 4, 5, 8-10, 15, 18-21, 23-25, 27, 28 and 37-40 in Group I. The final Office Action, like the Restriction Requirement and Applicant's response to the same, should therefore also include claim 5 as part of the Group I claims.

Status of Application, Amendments, And/Or Claims

The final Office Action identifies the status of claims 5, 11, 16-19, 21, 22 and 25 as withdrawn. The final Office Action alleges Applicant's last-filed amendment is not compliant because it did not identify the status of claim 25 as withdrawn. The final Office Action cites page 2 of an Office Action mailed May 1, 2007 as its justification for withdrawing claim 25 from consideration. Applicant respectfully points out that the Office's most recently mailed Restriction Requirement, mailed December 7, 2007, required Applicant to elect species for each of: respiratory infections (as recited in claim 9-11), respiratory diseases (as recited in claims 25, 28 and 40) and type of additional therapy (as recited in claims 15 and 18-21). Applicant elected "bronchopulmonary dysplasia" as the respiratory disease for examination. (Applicant's Response at page 8, ¶3; March 7, 2008.) Because "bronchopulmonary dysplasia" is recited in claim 25, claim 25 reads on the elected species and should be under examination. Applicant's last filed amendment is compliant.

Objections

1. Claims 9 and 10 are objected to for reciting non-elected inventions. Applicant respectfully traverses the objection.

[M]ore than one species of an invention, not to exceed a reasonable number, may be specifically claimed in different claims in one national application, provided the application also includes an allowable claim generic to all the claimed species and all the claims to species in excess of one are written in dependent form or otherwise include all the limitations of the generic claim.

37 C.F.R. 1.141(a).

Applicant submits that the recitation of non-elected species in claims 9 and 10 is permissible under 37 C.F.R. 1.141(a). Claims 9 and 10 recite a reasonable number of species of the invention that are claimed in different claims in one national application. The instant application also includes an allowable generic claim that reads on the claimed species. Claims 9 and 10 ultimately depend from claim 1, which is generic to the claimed species recited in claims 9 and 10. Claim 1 is also in condition for allowance, as it has been amended to include the recitations of claim 37. The final Office Action indicated claim 37 would be allowable if rewritten in independent form. Office Action at page 6, ¶2. Thus claims 9 and 10, dependents from allowable generic claim 1, are permissible under 37 C.F.R. 1.141(a). Applicant respectfully requests the withdrawal of the objection.

2. Claims 20, 23, 27 and 28 are objected to for depending from withdrawn claims. Applicant respectfully traverses the objection.

Claim 5 is withdrawn insofar as it does not read on the elected species. As the examined claims are in condition for allowance, claim 5 should be rejoined with the remainder of the claims in the application. Applicant notes that claim 5 has been examined on the merits (Office Action mailed May 1, 2007) and any issues relating to patentability have been resolved. Applicant further notes, as earlier discussed, that claim 5 is a claim in Applicant's Group I, elected in response to Restriction Requirement. Applicant respectfully requests the withdrawal of the objection.

3. Claims 37-40 are objected to as being dependent upon a rejected base claim. Applicant respectfully traverses the objection.

Solely to expedite the prosecution, claim 1, the independent claim for dependent claim 37, has been amended to incorporate the elements of claim 37, and claim 38 has been amended to depend from claim 1. Claims 39 and 40 were canceled. These amendments render the objection moot. Applicant therefore respectfully requests the withdrawal of the objection.

Rejection Under 35 U.S.C. §§ 102(b) and 103

1. Claims 1 and 24 stand rejected under 35 U.S.C. § 102(b) as anticipated by Levitt *et al.* (U.S. Patent No. 6,261,559).
2. Claims 8 and 15 have been rejected under 35 U.S.C. § 103 as being unpatentable over Levitt *et al.* in view of Skoner (*Pediatrics* 109 (2002):381-392).
3. Claims 9 and 10 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Levitt *et al.* in view of Elliott (*Phil. R. Soc. Lond.* 356 (2001):1885-1893).

Applicant respectfully traverses these rejections under 35 U.S.C. §§ 102(b) and 103.

Claim 1 has been amended to incorporate the elements of claim 37. Claims 8-10, 15 and 24 depend from independent claim 1 and incorporate its elements by way of reference (35 U.S.C. § 112 paragraph 4).

The Office Action states that claim 37 would be allowable if rewritten in independent form including all of the elements of the base claim and intervening claims. Office Action at page 6, ¶2. Because amended claim 1 is claim 37 rewritten in independent form including all of the limitations of the base claim and intervening claims, and because claims 8-10, 15 and 24 depend from claim 1, claims 1, 8-10, 15 and 24 are in condition of allowance. Therefore the withdrawal of the rejections under 35 U.S.C. §§ 102(b) and 103 is respectfully requested.

Rejoinder of Claims Pursuant to M.P.E.P. § 821.04

Applicant believes that the generic linking claims under examination and the species they read on (viral infection, influenza virus, bronchopulmonary dysplasia, and an antiviral agent) are either allowed (claims 3 and 4) or in condition of allowance (claim 1 and 5). Applicant therefore respectfully requests the rejoinder and allowance of the un-elected species pursuant to MPEP § 821.04.

Respectfully submitted,

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